FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1350

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

JUDY GROVE SOWERS

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Kenneth D. Chestek
Murphy, Taylor, Trout & Chestek, P.C.
518 State Street
Erie, PA 16501
(814) 459-0234

James F. Israel
Israel and Wood, P.C.
Suite 501 Grant Building
Pittsburgh, PA 15219
(412) 391-1114

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI IN LIGHT OF *DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES* ... 1

III. UNDER *DESHANEY*, NO CONSTITUTIONAL DUTY OF PROTECTION WAS OWED TO SOWERS BECAUSE SHE WAS AT LIBERTY 3

IV. CONCLUSION 9

TABLE OF AUTHORITIES

CASES

City of Canton v. Harris, 57 U.S.L.W. 4270 (February 28, 1989), 1989 U.S. LEXIS 1200 7

Delcambre v. Delcambre, 635 F.2d 407 (5th Cir. 1981) . 7

DeShaney v. Winnebago County Department of Social Services, 489 U.S. , 57 U.S.L.W. 4218 (February 22, 1989) 1-7

Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985) 2

Hicks v. Feeney, 770 F.2d 375, 380 (3d Cir. 1985) 3

Ingraham v. Wright, 430 U.S. 651, 670 (1977) 6

Monell v. New York City Department of Social Services, 436 U.S. 658 at 691 (1978) 7

Smith v. Stoneking, No 88-802 (U.S. March 6, 1989), 1989 U.S. LEXIS 1232 1

Sowers v. Bradford Area High School, No. 88-3640 (3d Cir. January 31, 1989), 1989 U.S. App. LEXIS 924 2

Stoneking v. Bradford Area School District, 856 F.2d 594, 600-01 (3d Cir. 1988), *cert. granted, judgment vacated and remanded sub nom. Smith v. Stoneking*, No. 88-802 (U.S. March 6, 1989) 2

STATUTES

42 U.S. §1983 . . . . . 2, 4, 7

I. INTRODUCTION

The Respondent, Judy Grove Sowers (hereinafter "Sowers"), has included in her Brief in Opposition to Petition for Writ of Certiorari a number of misstatements of fact and law that distort Petitioners' arguments. Petitioners take this opportunity to redirect this Court's attention to the real issue presented in this case: whether Petitioners Smith, Miller and Shuey are immune from suit under the facts alleged by Sowers in this case.

In reviewing the issue of qualified immunity, this Court should be aware of an intervening development. On March 6, 1989, this Court granted a writ of certiorari, and vacated and remanded the judgment of the Third Circuit in a companion case in which these same Petitioners appealed the denial of the defense of qualified immunity. *Smith v. Stoneking*, No. 88-802 (U.S. March 6, 1989), 1989 U.S. LEXIS 1232. This Court's order was entered in light of its decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. , 57 U.S.L.W. 4218 (February 22, 1989). This appeal presents an even more compelling case for a grant of certiorari.

II. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI IN LIGHT OF *DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*

This Court should grant certiorari in light of the recent decision of *DeShaney v. Winnebago County*

Department of Social Services, supra. In that decision, this Court ruled that a municipality and its employees may not be held liable, under 42 U.S. §1983, for failing to protect an individual at liberty from abuse. In reaching this conclusion, this Court expressly rejected the rationale used by the Third Circuit in imposing liability under a similar fact pattern in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985). *Id.* at 4220.

This Court's decision in *DeShaney*, with its concurrent rejection of the rationale used in *Estate of Bailey by Oare*, has great significance for the instant appeal. In denying Petitioners' claim of entitlement to the defense of qualified immunity, the Third Circuit relied on its recent decision in *Stoneking v. Bradford Area School District*, 856 F.2d 594, 600-01 (3d Cir. 1988), *cert. granted, judgment vacated and remanded sub nom. Smith v. Stoneking*, No. 88-802 (U.S. March 6, 1989). *Sowers v. Bradford Area School District*, No. 88-3640 (3d Cir. January 31, 1989), 1989 U.S. App. LEXIS 924. In *Stoneking*, the Third Circuit incorporated and applied its now-rejected *Estate of Bailey by Oare* rationale in determining that Petitioners were not entitled to assert the defense of qualified immunity. Because this Court has now expressly rejected the rationale used by the Third Circuit in denying Petitioners' appeal, this Court should grant certiorari and reverse the judgment of the court below.

The decision by this Court in *DeShaney* serves to underscore Petitioners' argument that no clearly established law existed in 1979 that imposed a constitutional duty upon

Petitioners to protect public school students enrolled in the Bradford Area School District. In determining whether or not a public official is entitled to a defense of qualified immunity, one must identify legal principles governing analogous factual situations at the time the alleged constitutional violation occurred, and if any existed, determine whether the public official should have related this established law to the situation before them. *Hicks v. Feeney*, 770 F.2d 375, 380 (3d Cir. 1985).

DeShaney represents the factual situation that is most analogous to the present case. *DeShaney* involved a state agency's failure to protect a minor at liberty from physical abuse, the gravamen of Respondent's claim herein. Petitioners have previously argued that no clearly established constitutional duty to protect a public school student existed in 1979; this Court's 1989 decision in *DeShaney* confirms Petitioners' contention.

III. UNDER *DESHANEY*, NO CONSTITUTIONAL DUTY OF PROTECTION WAS OWED TO SOWERS BECAUSE SHE WAS AT LIBERTY

The judgment of the Third Circuit in this case conflicts with this Court's decision in *DeShaney* and *Stoneking* and should be reversed. Despite the hyperbolic argument in Respondent's Brief in Opposition to Petition for Writ of Certiorari, the gravamen of Sowers' Complaint is an alleged failure of the Petitioners to protect her from a criminal assault by a teacher, committed during summer vacation when she was voluntarily present in the teacher's

home, when the district had no knowledge of the criminal activity or the fact that Sowers, in particular, was at risk.[1] Indeed, Sowers readily admits that the incident occurred during summer vacation, and in a teacher's private home. Respondent's Brief, pp. 3-4.

The rationale of *DeShaney* cannot lead to any conclusion other than that Petitioners may not be sued, under §1983, for the alleged incident of sexual abuse that occurred during the summer of 1979. In *DeShaney*, this Court established the parameters for governmental liability in the context of an alleged substantive due process violation:

> When a state by an affirmative exercise of its powers so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- *e.g.*, food,

---

[1]Paragraph 36 of Respondent's Complaint sets forth Sowers' claims against Petitioners. In this paragraph, Sowers alleges that "defendants' consistent failure to respond appropriately to various complaints of sexual abuse or harassment by teachers . . . [and] in particular the recklessly indifferent fashion in which the defendants addressed the complaints of the plaintiff . . ." resulted in an allegedly unconstitutional deprivation of her 14th Amendment liberty interest. App., p. 60-61. Thus, Sowers does not claim that Petitioners touched or abused her in any way; a plain reading of Respondent's complaint reveals that her claim is based solely upon a duty to protect theory.

Even under this theory of liability, Petitioners are at a loss to comprehend how their alleged failure to repond to Sowers' complaints resulted in her injury, since her complaints concerning Wright were made *subsequent* to the incident.

> clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the due process clause. . . . The affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. . . . *In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protection of the due process clause, not its failure to act to protect his liberty interest against harms inflicted by other means.*

DeShaney, 57 U.S.L.W. at 4220-21 [emphasis added][citations omitted].

This holding, imposing liability only when the state affirmatively and completely restrains an individual's liberty, is particularly illustrative of the error made by the Third Circuit in determining that Petitioners owed a constitutional duty of protection to Sowers. Certainly, Sowers was not in the custody of the school district or its administrators at the

time of the alleged incident[2], nor did the school district or its administrators affirmatively restrain Respondent's freedom to act on her own behalf.

Indeed, this Court has previously indicated that public school setting is qualitatively different from the incarceration or institutionalization setting emphasized in *DeShaney*:

> Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving during school hours; and at the end of the school day, the child is invariably free to return home.

Ingraham v. Wright, 430 U.S. 651, 670 (1977).

It must be remembered that, in making this analysis, this Court was commenting on the in-school environment in which public school students are placed. Sowers, at the time of the alleged incident, was not even subject to the minimal restraints on liberty that are found in the public school setting. In fact, she was constrained, if at all, by

---

[2]Sowers, during her summer school vacation, was in the legal custody of her parents at the time of the incident of which she complains. Further, Sowers does not allege that the school district and Petitioners committed any affirmative act that restrained her liberty at the time the incident allegedly occurred. She was not incarcerated or institutionalized; nor was she subject to the *in loco parentis* authority that the school district and its administrators possess during school hours. Sowers was indeed free from any affirmative state restraint on her liberty, as are all teenagers who do not attend school during summer vacation.

only those restrictions placed upon her by her parents. She was completely free from any state restraint on her liberty, and Petitioners owed her no affirmative constitutional duty of protection.

Sowers, however, asserts that *DeShaney* is not controlling, because the alleged sexual abuse to which she was subjected was committed by a teacher, Edward Wright. Respondent's Brief, p.11. However, for purposes of analyzing Sowers' claim, Petitioners submit that the Wright was, in functional terms, a private citizen at the time of the incident. *See Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981) (on-duty policeman, involved in purely private altercation, does not act under color of state law). Despite Sowers' protests to the contrary, Wright was not acting as an agent of the district at the time of the alleged assault; any acts that he may have committed were not related, in any conceivable way, to his employment as a school district teacher. He was not charged with any formal teaching duties, and the alleged incident occurred during summer vacation, and in his private home.[3]

---

[3] Respondent's reference to Wright as an "agent" of the school district confirms Sowers' continued pursuit of a *de facto* claim of *respondeat superior* liability against it and Petitioners in this case. Such a theory is contrary to accepted law; a municipal government cannot be liable under § 1983 on a *respondeat superior* theory of liability. *See Monell v. New York City Department of Social Services*, 436 U.S. 658 at 691 (1978); *see also City of Canton v. Harris*, 57 U.S.L.W. 4270 (February 28, 1989), 1[illegible] U.S. LEXIS 1200.

Petitioners owed no constitutional duty of protection to Sowers. They are entitled to assert the defense of qualified immunity, and be dismissed from this proceeding.

IV. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed in the Petition.

Kenneth D. Chestek, Esq.
MURPHY, TAYLOR, TROUT & CHESTEK, P.C.
518 State Street
Erie, PA 16501
(814) 459-0234

James F. Israel, Esq.
ISRAEL AND WOOD, P.C.
Suite 501 Grant Building
Pittsburgh, PA 15219
(814) 391-1114

Attorneys for Petitioners

V. PROOF OF SERVICE

I hereby certify that three copies of the within Petitioners' Reply Brief in Support of Petition for Writ of Certiorari were served on Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 30th day of March, 1989.

Kenneth D. Chestek

Kenneth D. Chestek, Esq.